

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

DEC 16 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANANT KUMAR TRIPATI,)	
)	
Plaintiff/Appellant,)	2 CA-CV 2008-0069
)	
v.)	
)	
GENE YARBROUGH, et al.)	
)	
Defendants/Appellees.)	
)	
ANANT KUMAR TRIPATI,)	
)	
Plaintiff/Appellant,)	2 CA-CV 2008-0070
)	
v.)	
)	
JESUS VILLACANA, et al.)	
)	
Defendants/Appellees.)	
)	
ANANT KUMAR TRIPATI,)	2 CA-CV 2008-0071
)	(Consolidated)
Plaintiff/Appellant,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MARGARET BALDANEGRO, et al.)	Rule 28, Rules of Civil
)	Appellate Procedure
Defendants/Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause Nos. CV200700397, CV200700398, and CV200700399

Honorable William J. O'Neil, Judge

APPEAL DISMISSED

Anant Kumar Tripathi

Tucson
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 In this consolidated appeal, appellant Anant Tripathi appeals from the trial court's orders dismissing claims he filed against various employees of the Arizona Department of Corrections (ADOC). He also appeals from the court's denial of his motions to vacate its dismissal orders. Because we do not have jurisdiction over the appeal, it is dismissed.

¶2 In February 2007, Tripathi, an ADOC inmate, filed three lawsuits against various ADOC employees: a claim for declaratory relief based on a purported denial of access to the prison grievance system and to his attorney; a complaint alleging fraud, breach of contract, racketeering, "enterprise," and a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, for failure to provide him with a Hindu-compliant diet; and a complaint pursuant to 42 U.S.C. § 1983, claiming the

defendants violated his rights under the Equal Protection Clause when they denied him access to education programs because he is not a United States citizen.

¶3 He also filed, in each case, an application for deferral or waiver of his court and service of process fees, which the trial court denied. Apparently assuming the court had granted his applications, Tripati sent his complaints to the sheriff to serve process on the defendants. But the sheriff's office returned them to Tripati because he had "not include[d] payment or an Order of Payment Deferral." Tripati then filed a motion to extend time for effecting service of process. The court granted his motions, giving Tripati until October 29, 2007, to complete service, and directed Tripati to request that the defendants waive service of the summons. In August 2007, when the defendants apparently did not respond to Tripati's request to waive service, Tripati filed a handwritten request that the court "authorize the sheriff to serve the summons and complaint."

¶4 On October 30, 2007, the court denied Tripati's request in each case, stating it had "reviewed the Complaint [and] notes that all allegations have no merit as they are entirely against the Arizona Department of Corrections. The employees of that Department, as a result, may not be individually sued." The court ruled, "[T]he matter will be continued on the Inactive Calendar and will be dismissed without further notice unless an amendment to the pleadings is submitted and the proper parties are named and served by the Defendant." The court set the matters for dismissal on December 10, 2007.

¶5 On December 19, 2007, Tripati filed a motion to vacate in each case, arguing “the dismissal was in error,” although the court had not yet dismissed his complaints. He contended he needed a typewriter, apparently believing the court had set his cases for dismissal because it could not read his writing. He also summarized his claims in each lawsuit. He did not, however, properly serve the defendants in any of the three cases or explain why he had not done so. Two days later, the court dismissed his complaints pursuant to Rule 38.1(d), Ariz. R. Civ. P. Tripati then filed a “motion per Rule 59(a)(1)(3)(6)(8),” reiterating that his cases should not have been dismissed because his “complaint[s] set forth viable claims.” The court denied his motions, and Tripati now appeals from the dismissals.

¶6 We have a duty to independently determine whether we have jurisdiction over an appeal and to dismiss the appeal if jurisdiction is absent. *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 7, 160 P.3d 223, 226 (App. 2007). Tripati’s complaints were dismissed without prejudice.¹ Generally, a dismissal without prejudice is not appealable, *see L.B.*

¹Although the trial court dismissed Tripati’s claims for lack of prosecution under Rule 38.1, Ariz. R. Civ. P., it did so outside the time requirements of that rule. However, the court’s minute entries suggest it was not actually dismissing Tripati’s cases for lack of prosecution, but, at least in part, for his failure to serve process on the defendants. The court noted, in each case, “[T]he matter will be continued on the Inactive Calendar and will be dismissed without further notice unless an amendment to the pleadings is submitted and the proper parties are named and served by the Defendant.” Although the court erred in dismissing the claims under Rule 38.1, if service is not effected within 120 days after the filing of the complaint, “the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time.” Ariz. R. Civ. P. 4(i). Well after the 120-day deadline

Nelson Corp. of Tucson v. W. Am. Fin. Corp., 150 Ariz. 211, 217, 722 P.2d 379, 385 (App. 1986), because it is not a final judgment that bars the refiling of the suit. *See State ex rel. Hess v. Boehringer*, 16 Ariz. 48, 51, 141 P. 126, 127 (1914).

¶7 But, A.R.S. § 12-2101(D) provides an exception to the general rule by giving this court jurisdiction to decide appeals from an order of dismissal without prejudice “when the order in effect determines the action and prevents judgment from which an appeal might be taken.” *See also Boehringer*, 16 Ariz. at 51, 141 P. at 127. This exception could apply when the complaint is dismissed after the statute of limitations has run, precluding the plaintiff from refiling his claims. *See Maher v. Urman*, 211 Ariz. 543, ¶ 20 & n.6, 124 P.3d 770, 777 & n.6 (App. 2005) (exercising jurisdiction over appeal from dismissal without prejudice without discussion when statute of limitations had clearly run on claims). The exception could also apply when the court dismisses a complaint without leave to amend. *See Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, ¶¶ 6, 13, 91 P.3d 1019, 1022, 1023 (App. 2004); *Flynn v. Johnson*, 3 Ariz. App. 369, 373, 414 P.2d 757, 761 (1966). Here, the court did not deny Tripati leave to amend his complaint, so unless he was otherwise precluded from refiling his actions, we have no jurisdiction over this appeal.

had passed, the court gave Tripati an extension to complete service. And even after the extended deadline had passed, Tripati had nearly two months before the cases were dismissed to serve the defendants and failed to do so.

¶8 Tripati brought claims under two federal statutes, § 1983 and RLUIPA.² See § 2000cc-1. Prisoners are required to exhaust remedies under the prison grievance system before filing such suits. See 42 U.S.C. § 1997e(a); *Baker v. Rolnick*, 210 Ariz. 321, ¶¶ 22-24, 110 P.3d 1284, 1289 (App. 2005). Tripati has not alleged the date on which he had exhausted any remedies under the prison grievance process in either matter. And, Arizona law has not yet fully clarified whether the statute of limitations would have been tolled while Tripati exhausted his administrative remedies through the prison grievance system. See *Third & Catalina Assocs. v. City of Phoenix*, 182 Ariz. 203, 207, 895 P.2d 115, 119 (App. 1994) (tolling statute of limitations during exhaustion of administrative remedies in lawsuit not filed by prisoner); cf. *Minor v. Cochise County*, 125 Ariz. 170, 173, 608 P.2d 309, 312 (1980) (no violation of law until permit declared invalid by administrative board).

¶9 The law is clear that a two-year statute of limitations applies to § 1983 claims brought in Arizona's courts. See *Madden-Tyler v. Maricopa County*, 189 Ariz. 462, 465-66, 943 P.2d 822, 825-26 (App. 1997). But Arizona has never addressed which limitations period applies to RLUIPA claims brought in its courts. Federal district courts, however,

²We address only the claims over which the trial court had subject matter jurisdiction. Tripati's breach of contract, fraud, racketeering, and "enterprise" claims were not properly before the trial court because he did not allege serious physical injury or that the claims are authorized by federal statute. See A.R.S. § 31-201.01(F), (L); *Tripati v. State*, 199 Ariz. 222, ¶ 9, 16 P.3d 783, 786 (App. 2000). Tripati's claims that he was denied access to the prison grievance system and to his attorney would arguably also fall under 42 U.S.C. § 1983. However, he did not allege a violation of this statute in his complaint for declaratory relief, and even a liberal construction of his complaint would not cure our lack of jurisdiction over the appeal. Thus, we do not address these claims further.

have uniformly applied the four-year federal catch-all statute to such claims. *See* 28 U.S.C. § 1658; *Mitchell v. Dep't of Corr.*, 2008 WL 4527863, 7 (E.D. Wash. 2008); *Gould v. Beard*, 2008 WL 2498369, n.4 (W.D. Pa. 2008); *United States v. Maui County*, 298 F. Supp. 2d 1010, 1012-13 (D. Haw. 2003); *see also Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004) (holding that § 1658 applies whenever plaintiff's claim made possible by an enactment of Congress made after 1990).

¶10 Because we lack sufficient information to determine precisely when Tripati's claims accrued and because the law involved in making such a determination is not settled in Arizona and has not been argued to us in this appeal, we cannot conclude Tripati's claims would have been barred by the statute of limitations so as to render the court's orders final judgments. *See Osuna v. Wal-Mart Stores, Inc.*, 214 Ariz. 286, n.4, 151 P.3d 1267, 1271 n.4 (App. 2007) (declining to adopt rule that jurisdiction vests in dismissal without prejudice when claims otherwise time barred because statute of limitations not jurisdictional, can be waived, and court would be "rais[ing] an affirmative defense on a defendant's behalf"). Moreover, even time-barred claims may be resurrected under Arizona's savings statute. *See* A.R.S. § 12-504(A).

¶11 The appeal is dismissed.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge